

Dated: November 12, 2015

Respectfully submitted,

OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.

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CERTIFICATE OF SERVICE

The undersigned certifies that on November 12, 2015, a copy of the foregoing *Respondent's Exceptions to the Decision of the Administrative Law Judge and its Request for Oral Argument* has been filed via electronic filing with:

Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
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and served via e-mail upon:

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

HOBBY LOBBY STORES, INC.

and

Case 20-CA-139745

THE COMMITTEE TO PRESERVE THE
RELIGIOUS RIGHT TO ORGANIZE

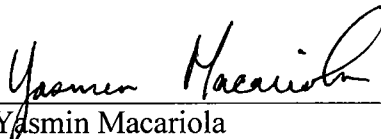
GENERAL COUNSEL'S CROSS EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION

Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel of the National Labor Relations Board files the following cross exceptions to the Administrative Law Judge's Decision which was issued on September 8, 2015, by Administrative Law Judge Eleanor Laws, herein called the ALJ.

<u>Exception No.</u>	<u>Page</u>	<u>Lines</u>	<u>Cross Exception</u>
1	19	10-11	To the ALJ's inadvertent error in her conclusion of law that Respondent violated the Act when it enforced the MAA in litigation against the Charging Party, instead of plaintiffs Ortiz and Fardig.
2	21	13	To the ALJ's typographical error in her Order requiring that Respondent provide a copy of its notice to the Regional Director of Region 31, instead of Region 20.
3	Appendix A, pages 1-2	Paragraphs 6 and 7	To the ALJ's typographical errors in her Notice which refers to Plaintiffs Ortiz and Fardig as "her" and "she" instead of "their" and "they."

DATED AT San Francisco, CA, this 3rd day of December, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Yasmin Macariola", is written over a horizontal line.

Yasmin Macariola
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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20

HOBBY LOBBY STORES, INC.

and

Case 20-CA-139745

THE COMMITTEE TO PRESERVE THE
RELIGIOUS RIGHT TO ORGANIZE

AFFIDAVIT OF SERVICE OF: GENERAL COUNSEL'S CROSS EXCEPTIONS TO
THE ADMINISTRATIVE LAW JUDGE'S DECISION

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on December 3, 2015, I served the above-entitled document(s) by **electronic mail**, as noted below, upon the following persons, addressed to them at the following addresses:

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December 3, 2015

Date

Susie Louie, Designated Agent of NLRB

Name

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Signature

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The Committee to Preserve the Religious
Right to Organize

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 20

HOBBY LOBBY STORES, INC,

Respondent,

and

THE COMMITTEE TO PRESERVE THE
RELIGIOUS RIGHT TO ORGANIZE,

Charging Party.

CASE Nos. 20-CA-139745

**CHARGING PARTY'S CROSS-
EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

Charging Party hereby files the following Cross-Exceptions to the Decision of the
Administrative Law Judge ("ALJ").

<u>No.</u>	<u>Exception</u>	<u>Language</u>
1.	Passim	To the description of the disputed agreement as the Mutual Arbitration Agreement. It should be referred to as a Forced Unilateral Arbitration Procedure ("FUAP"). By using the Employer's term, it inaccurately describes the forced nature of the unilateral arbitration procedure.
2.	P. 2 line 1-2	To the Order granting the joint motion to submit a stipulated record. That Order prevented the Charging Party from putting on evidence as to many issues including the application of the Religious Freedom Restoration Act, the lack of any business purpose for the FUAP, the extent of any remedy and other issues. To the ALJ's Order to the extent it served to quash a subpoena served on Hobby Lobby.

<u>No.</u>	<u>Exception</u>	<u>Language</u>
3.	P. 7, fn. 3	To the failure of the ALJ to recognize that <i>Lutheran Heritage Village-Livonia</i> , 343 NLRB (2004) should be overruled and has been effectively overruled. To the failure of the ALJ to apply the correct test to determine the lawfulness of rules.
4.	P 7, fn 3	To the failure of the ALJ to recognize that the Board has undermined and effectively overruled <i>Lutheran Heritage Village-Livonia</i> by adopting the doctrine that ambiguities are construed against the employer.
5.	P. 7 line 22-p.9 line 44	To the failure of the ALJ to find the FUAP is unlawful because it prohibits group actions which might be 2 or three workers bringing a claim which is not a class action, collective action or other procedural device.
6.	P. 7 line 22-p.9 line 44	To the failure of the ALJ to find that the FUAP waives substantive protections of state and federal law. For example it purports to waive PAGA and other substantive rights of state law. It waives the right to assert the doctrine of res judicata or collateral estoppel against Hobby Lobby.
7.	P. 9, Ins. 1-4	To the erroneous conclusion that the EEOC's charge processing procedures do not "serve any concerns or purposes under the NLRA." EEOC has stringent anti-retaliation provisions which would apply to Section 7 protected activity.
8.	P. 9, Ins. 8-11	To the failure of ALJ to find that employees can be disciplined for failing to use the FUAP. The FUAP is a policy and the Employer's handbook clearly states that employees can be disciplined for failing to follow company policy.
9.	P. 10, Ins. 1-17	To the failure of the ALJ to require that the Respondent prove the existence of an employment contract or other contract under state law in each state in which the Employer operates. Absent an employment contract or any other contract, there is no basis to apply the Federal Arbitration Act. Indeed, the FUAP expressly disclaims the existence of any contract.
10.	P 10, Ins 1-17.	To the failure of the ALJ to find that there was no "transaction" so that the FAA does not apply.
11.	P. 10, ln. 19 – P. 15, ln. 32	Although the Charging Party agrees with the ALJ's conclusion that the FUAP does not affect commerce and thus the FAA may not be applied, the same is true of application of the arbitration agreement to concerted efforts by employees.
12.	P. 10, ln. 19 – P. 15, ln. 32	To the failure of ALJ to find that the FAA may not be applied because the activity regulated is dispute resolution. Thus, the Respondent would have to prove that the dispute resolution in each case affects commerce to apply the FAA.
13.	P. 10, fn. 7	To the failure of ALJ to find that the FUAP is unlawful

<u>No.</u>	<u>Exception</u>	<u>Language</u>
		because it and the Handbook contain unlawful provisions. Contrary to the ALJ, the Charging Party does not seek a finding that those provisions are independently unlawful but only that the FUAP violates the Act because it incorporates and applies provisions which restrict Section 7 rights. These restrictions make the FUAP itself unlawful. For example the limitation on solicitation makes it more difficult for employees to seek support from other employees to raise a claim in the FUAP.
14.	P. 10, fn. 7	To the failure of ALJ to recognize that federal and state statutes protect the rights of employees to bring claims and thus the application of the FAA would undermine other statutes, particularly federal statutes. The application of the FAA to protect the FUAP interferes with state and federal whistle blower statutes which serve important statutory and public purposes.
15.	P. 10, fn. 7	To the failure of the ALJ to apply the correct burden of proof. The Respondent must show that there are no state or federal laws that are undermined, or where the statutory remedy is affected by the application of the FUAP.
16.	P. 10, fn. 7	To the failure of ALJ to apply the Religious Freedom Restoration Act and to award attorney's fees.
17.	P. 10, fn. 7	To the failure of ALJ to recognize that the FUAP interferes with union activity and union representation including salting. It interferes with the right of a union or other organization to represent workers concertedly in the FUAP
18.	P. 10, fn. 7	To the failure of the ALJ to find that the failure of Hobby Lobby to provide the FUAP and the handbook in Spanish and other languages violates the Section 7 rights of employees.
19.	P. 10, fn 7	To the failure of the ALJ to recognize that the FUAP is unconscionable under state law and thus invalid to the extent it prohibits concerted activity.
20.	P. 10 fn 7	To the failure of the ALJ to recognize that the FUAP prohibits employees from joining together to defend claims and this interferes with Section 7 rights.
21.	P. 10, fn 7	To the failure of the ALJ to recognize that the FUAP prohibits concerted action in the form of boycotts, picketing, bannering and other forms of concerted activity because employees are required to use the FUAP to resolve claims or disputes.
22.	P 10, fn 7	To the failure of the ALJ to recognize the FUAP applies to persons who are not the employer and who are not bound by the FUAP. Similarly to the extent the FUAP prohibits making joint employer arguments against an employer is not a party to the FUAP, it interferes with Section 7 rights.

<u>No.</u>	<u>Exception</u>	<u>Language</u>
23.	P. 13, fn. 13	To the failure of ALJ to find that the employee handbook is not a contract under state law. To the same degree, Respondent was obligated to prove that under the state law in which it operates, in each state, the handbook constitutes a contract. Furthermore, handbook expressly disclaims that it creates any contract.
24.	P. 13, fn. 14	Nothing is peculiar here. In the employment relation, employers avoid creating a contract. Thus, they are left in an anomalous position of the only alleged contract being the FUAP containing the forced arbitration procedure.
25.	P. 13, lns. 6-9, fn. 15	To the failure of ALJ to find that there is no consideration because an at-will employment is not a contract and therefore FUAP cannot be supported by consideration.
26.	P. 14, fn. 16	To the failure of the ALJ to recognize that the company policies include the FUAP and employees can be disciplined for violation of policies. However, the handbook makes it clear that violation of company policies will lead to discipline and employees would reasonably read that this language as including failure to follow the FUAP.
27.	P. 14, lns. 17-27	To the failure of ALJ to recognize that disputes among employees would also not affect commerce. Similarly, to the failure of ALJ to find that the dispute resolution procedure as applied to more than one employee would not also affect commerce.
28.	P. 15, lns. 30-32	To the conclusion of the ALJ to the extent that ALJ fails to recognize that there is no showing that concerted claims would affect the commerce.
29.	P. 15, lns. 30-32	To the failure of the ALJ to recognize that the FAA must be analyzed with respect to whether the dispute resolution procedure affects commerce or the use of that procedure affects commerce.
30.	P. 15, ln. 41 – P. 16, ln. 2	To the phrase “regardless of the Board’s decisions in <i>D.R. Horton</i> and related cases” is misstated. Those cases do not address the application of the FAA to truck drivers or other transportation workers.
31.	P. 17, lns. 15-17	The Board’s decision in <i>Lutheran Heritage</i> should be overruled.
32.	P. 21	As to the Conclusions of Law to the extent that they are inconsistent with the cross-exceptions of the Charging Party, they should be amended.
33.	P. 19 – P. 20, ln. 7	To the Remedy in that it is inadequate on a number of grounds.

<u>No.</u>	<u>Exception</u>	<u>Language</u>
34.	P. 20, ln. 9 - P. 21, ln. 27	To the Order to the extent that it is inconsistent with the cross-exceptions of the Charging Party. The Order is also inadequate in that it fails to order the appropriate remedies.
35.	P. 20, ln. 19-21	To the Order in the failure of the ALJ to include not only class or collective action, but also group action or representative action or any other form of group action. California and other state laws allow other forms of group action, including representative actions. In addition, group actions which would not be considered class, collective or consolidated action are prohibited.
36.	Appendix A	To the Notice to Employees in that it contains the offensive language “[c]hoose not to engage in any of these protected activities.”
37.	Appendix A	To the Notice to Employees in that it refers to the Mandatory Arbitration Procedure rather than the Forced Unilateral Arbitration Procedure. To the failure of the Notice to have an affirmative statement of the violation.

Dated: December 4, 2015

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

By: /S/ DAVID A. ROSENFELD
DAVID A. ROSENFELD

Attorneys for Charging Party
The Committee to Preserve the Religious
Right to Organize

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**CERTIFICATE OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On December 4, 2015, I served the following documents in the manner described below:

**CHARGING PARTY'S CROSS-EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

☒ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on December 4, 2015, at Alameda, California.

/s/ Katrina Shaw
Katrina Shaw

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Hobby Lobby Stores, Inc. and The Committee to Preserve the Religious Right to Organize. Case 20–CA–139745

May 18, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND MCFERRAN

On September 8, 2015, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel and the Charging Party each filed cross exceptions and a supporting brief. The Respondent filed answering briefs, and the General Counsel and the Charging Party filed reply briefs.¹

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decisions in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part, 808 F.3d. 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found that maintaining the arbitration agreement violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practice charges with the Board.

The Board has considered the decision and the record in light of the exceptions and briefs,² and we affirm the

¹ In addition, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Charging Party filed a postbrief letter calling the Board's attention to recent case authority.

On January 29, 2016, the Charging Party filed a "motion to allow oral argument and suggestion for public notice." The Respondent's exceptions also requested oral argument. We deny the Charging Party's motion, and the Respondent's request, as the record, exceptions, and briefs adequately present the issues and positions of the parties.

² We find no merit in the Charging Party's cross-exceptions, which raise substantive arguments that are wholly outside the scope of the General Counsel's complaint. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. *Kimtruss Corp.*, 305 NLRB 710 (1991). Likewise, we reject the Charging Party's argument that the judge improperly approved the joint mo-

judge's rulings, findings and conclusions,³ and adopt the recommended Order as modified and set forth in full below.⁴

tion of the General Counsel and the Respondent for her to resolve the case on a stipulated record. The stipulated record includes sufficient evidence to evaluate the complaint, and the additional evidence that the Charging Party sought to introduce exceeded the scope of the General Counsel's theory.

³ In adopting the judge's conclusions that the Respondent violated Sec. 8(a)(1) by maintaining and enforcing its Agreement, we do not rely on her findings that: (1) the burden was on the Respondent to show that its Agreement was subject to the Federal Arbitration Act (FAA); (2) the Respondent failed to show that its Agreement affected commerce within the meaning of the FAA; and (3) the Respondent's team truckdrivers were exempt from the FAA. We may assume for purposes of this case that the FAA is applicable because, consistent with our decisions in *D. R. Horton* and *Murphy Oil*, supra, "[f]inding a mandatory arbitration agreement unlawful under the National Labor Relations Act, insofar as it precludes employees from bringing joint, class, or collective workplace claims in any forum, does not conflict with the Federal Arbitration Act or undermine its policies." *Murphy Oil*, 361 NLRB 72, slip op. at 6, citing *D. R. Horton*, supra, 357 NLRB at 2283–2288.

To the extent the Respondent argues that plaintiffs Fardig and Ortiz were not engaged in concerted activity in filing their class action wage and hour lawsuits in the United States District Court for the Central District of California and the Eastern District of California, respectively, we reject that argument. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7." *Id.*, slip op. at 2. See also *D. R. Horton*, supra, 357 NLRB at 2279.

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the Respondent's arbitration Agreement does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's Agreement is just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

We also reject the position of our dissenting colleague that the Respondent's motions to compel arbitration were protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. at 747, the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts that have the illegal

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3: “3. The Respondent violated Section 8(a)(1) when it enforced the MAA by asserting the MAA in litigation that Plaintiffs Fardig and Ortiz brought against the Respondent.”

ORDER

The National Labor Relations Board orders that the Respondent, Hobby Lobby Stores, Inc., Oklahoma City, Oklahoma, with a place of business in Sacramento, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

objective of limiting employees’ Sec. 7 rights and enforcing an unlawful contractual provision (such as the Respondent’s motions to compel arbitration in the underlying wage and hour lawsuits here), even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

Finally, we disagree with our dissenting colleague’s conclusion that the Respondent’s Agreement does not unlawfully interfere with employees’ right to file unfair labor practice charges with the Board. We note that our colleague repeats an argument previously made, that an individual arbitration agreement lawfully may require the arbitration of unfair labor practice claims if the agreement reserves to employees the right to file charges with the Board. As explained in *Ralphs Grocery*, 363 NLRB No. 128, slip op. at 3, that argument is at odds with well-established Board law.

⁴ We reject the Charging Party’s request that we impose additional remedies on the Respondent, as the Charging Party has not shown that the remedies set forth in *D. R. Horton* and *Murphy Oil* are insufficient to remedy the Respondent’s violations.

We have amended the judge’s conclusions of law to reflect that fact that Plaintiffs Fardig and Ortiz, and not the Charging Party, filed the lawsuits against the Respondent; and we have corrected the Order to reflect the appropriate regional office and to conform to the Board’s standard remedial language. Because the courts granted the Respondent’s motions to compel individual arbitration and the lawsuits are no longer pending, we find it unnecessary to order the Respondent, as in *Murphy Oil* (slip op. at 21–22), to remedy the Sec. 8(a)(1) enforcement violation by notifying the court that it no longer opposes the lawsuits filed by Plaintiffs Fardig and Ortiz. We have also substituted the attached notices for those of the administrative law judge.

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees’ right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign the mandatory arbitration agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) In the manner set forth in the remedy section of the judge’s decision, reimburse Maribel Ortiz and any other plaintiffs in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.) and Jeremy Fardig and any other plaintiffs in *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.) for reasonable attorneys’ fees and litigation expenses that they may have incurred in opposing the Respondent’s motions to dismiss the collective lawsuits and compel individual arbitration.

(d) Within 14 days after service by the Region, post at all facilities in California the attached notice marked “Appendix A,” and at all other facilities employing covered employees, copies of the attached notice marked “Appendix B.”⁵ Copies of the notices, on forms provided by the Regional Director for Region 20, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 28, 2014, and any former employees against whom the Respondent has enforced its mandatory arbitration agreement since April 28, 2014. If the Re-

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

spondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked Appendix B” to all current employees and former employees employed by the Respondent at those facilities at any time since April 28, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 18, 2016

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent’s Mutual Arbitration Agreement (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. Maribel Ortiz, Jeremy Fardig, and other employees each signed the Agreement. Later, Ortiz filed a lawsuit against the Respondent in federal court asserting class and representative claims for violations of federal and state wage and hour laws. In reliance on the Agreement, the Respondent filed a motion to compel individual arbitration, which the court granted. Fardig and other employees also filed a class action lawsuit against the Respondent in federal court alleging violations of wage and hour laws. Again relying on the Agreement, the Respondent filed a motion to compel individual arbitration, which the court granted. My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*¹ I also dissent from my colleagues’ finding that the Agreement

¹ 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority’s holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

interferes with the right of employees to file charges with the Board.

1. *The “Class Action” Waiver.* I agree that an employee may engage in “concerted” activities for “mutual aid or protection” in relation to a claim asserted under a statute other than NLRA.² However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an “individual” to “present” and “adjust” grievances “at any time.”³ This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee’s right to “refrain from” exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;⁴ (ii) a class-waiver agreement pertaining to non-NLRA

² I agree that non-NLRA claims can give rise to “concerted” activities engaged in by two or more employees for the “purpose” of “mutual aid or protection,” which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, above, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7’s statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

³ *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: “Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment” (emphasis added). The Act’s legislative history shows that Congress intended to preserve every individual employee’s right to “adjust” any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

⁴ When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) (“The use of class action procedures . . . is not a substantive right.”) (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) (“[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.”).

claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;⁵ and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).⁶ Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file motions in federal court seeking to enforce the Agreement. It is relevant that the federal courts that had jurisdiction over the non-NLRA claims *granted* the Respondent's motions to compel arbitration. That the Respondent's motions were reasonably based is also supported by court decisions that have enforced similar agreements.⁷ As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Hor-*

ton decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."⁸ I also believe that any Board finding of a violation based on the Respondent's meritorious federal court motions to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I do not believe the Board can properly require the Respondent to reimburse Ortiz, Fardig, or any other plaintiffs for their attorneys' fees and litigation expenses in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

2. *Interference with NLRB Charge Filing.* I disagree with the judge's finding and my colleagues' conclusion that the Agreement violates Section 8(a)(1) by interfering with NLRB charge filing. The Agreement requires arbitration of all employment-related disputes, including those arising under the NLRA,⁹ but expressly states that employees "are not giving up any substantive rights under federal, state, or municipal law (*including the right to file claims with federal, state, or municipal government agencies*)" (emphasis added). The judge found that although the Agreement does not preclude filing a charge with an administrative agency, the Agreement is unlawful because it requires arbitration of employment-related claims covered by the Act. However, for the reasons stated in my separate opinion in *Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part), I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge filing, at least where the agreement expressly preserves the right to file claims or charges with the Board or, more generally, with administrative agencies. The Agreement preserves this right.

⁵ The Fifth Circuit has repeatedly denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

⁶ Because my colleagues do not rely on the judge's findings regarding the FAA's application to the Agreement, I do not address them either. However, I disagree with my colleagues' assertion that, assuming the FAA applies here, finding an arbitration agreement that contains a class-action waiver unlawful under the NLRA does not conflict with the FAA. For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that arbitration agreements be enforced according to their terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

⁷ See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

⁸ *Murphy Oil, Inc., USA v. NLRB*, 808 F.3d at 1021.

⁹ The Agreement requires that "any dispute, demand, claim, controversy, cause of action or suit . . . that in any way arises out of, involves, or relates to Employee's employment . . . shall be submitted to and settled by final and binding arbitration." The only claims to which the Agreement does not apply are "claims for benefits under unemployment compensation laws or workers' compensation laws."

HOBBY LOBBY STORES, INC.

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Accordingly, I respectfully dissent.
Dated, Washington, D.C. May 18, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL reimburse Maribel Ortiz, Jeremy Fardig, and any other plaintiffs for reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motions to dismiss their collective wage claims and compel individual arbitration.

HOBBY LOBBY STORES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/20-CA-139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD
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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the mandatory arbitration agreement in all of its forms that the arbitration agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

HOBBY LOBBY STORES, INC.

The Board's decision can be found at www.nlrb.gov/case/20-CA-139745 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Yasmin Macariola, Esq., for the General Counsel.
Frank Birchfield, Esq., and *Christopher C. Murray, Esq.*, for the Respondent.
David Rosenfeld, Esq. for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, Administrative Law Judge. This case was tried based on a joint motion and stipulation of facts I approved on June 29, 2015. The charge in this proceeding was filed by the Committee to Preserve the Religious Right to Organize (the Charging Party) on October 28, 2014, and a copy was served by regular mail on Respondent, on October 29, 2014. The General Counsel issued the original complaint on January 28, 2015, and an amended complaint on April 9, 2015. Hobby Lobby, Inc. (the Respondent or Company) filed timely answers denying all material allegations and setting forth defenses.

On June 2, 2015, the General Counsel and the Respondent filed a joint motion to submit a stipulated record to the Administrative Law Judge (Joint Motion). The Charging Party did not join the Joint Motion. On June 3, I issued an order granting the Charging Party until June 17, to file a response to the Joint Motions, including any objections to it. On June 17, the Charging Party filed objections to the Joint Motion, and the General Counsel and the Respondent, replied to the objections, respectively, on June 23 and 24. I issued an order granting the Joint Motion over the Charging Party's objections on June 29.¹

¹ The June 3, 2015, order is hereby admitted into the record as administrative law judge (ALJ) Exh. 1, the Charging Party's June 17

The following issues are presented:

1. Whether the Respondent's Mandatory Arbitration Agreement (MAA) and related policies maintained by the Respondent, which requires employees, as a condition of employment, to waive their right to resolution of employment-related disputes by collective or class action violates Section 8(a)(1) of the National Labor Relations Act (the Act).
2. Whether the MAA maintained by the Respondent would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board in violation of Section 8(a)(1) of the Act.
3. Whether the Respondent's enforcement of the MAA through its motions to compel arbitration in *Jeremy Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVS-AN, U.S.D.C., Central District of California; and *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD, U.S.D.C., Eastern District Court of California, violates Section 8(a)(1) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Respondent, and the Charging Party, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, an Oklahoma corporation with several stores throughout the State of California, including one in Sacramento, California, has been engaged in business as a retailer specializing in arts, crafts, hobbies, home decor, holiday, and seasonal products. The parties admit, and I find, that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. FACTS

The Respondent, Hobby Lobby, is a national retailer of arts, crafts, hobby supplies, home accents, holiday, and seasonal products. It operates approximately 660 stores in 47 states.

The Respondent employs individuals in various job titles including but not limited to the following: office clericals; security staff; cashiers; stockers; floral designers; picture framers; media buyers; craft designers; graphic & web designers; production artists; video tutorial hosts; leave assistants; production quality and compliance assistants; construction warehouse workers; customer service representatives; industrial engineers; inventory control specialists; maintenance technicians; pack-

response is admitted as ALJ Exh. 2, the General Counsel's June 23 reply is admitted as ALJ Exh. 3, and the Respondent's June 24 reply is admitted as ALJ Exh. 4. The following abbreviations are used for citations in this decision: "Jt. Mot." for the General Counsel and Respondent's joint motion; "Jt. Exh." for the exhibits attached to the joint motion; "GC Br." for the General Counsel's brief; "R Br." for the Respondent's brief; and "CP Br." for the Charging Party's brief. Although I have included several citations to the record to highlight particular exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

HOBBY LOBBY STORES, INC.

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ers/order pullers; photo editors; truck-trailer technicians; truck-trailer technician trainees; social media writers; sales and use tax accountants; and team truck drivers who transport Respondent's products across state lines. (Jt. Mot. ¶ 4(a) & ¶ 4(b).)

Upon commencing employment, all employees receive a copy of the Respondent's employee handbook. There are two different versions of the employee handbook—one for employees in California and one for employees outside of California. Employees must sign in receipt of the handbook and agree to be bound by its terms. The version applicable to employees in California states²:

By my signature below, I acknowledge that I have received a copy of the Company's California Employee Handbook ("Employee Handbook"). I understand this Employee Handbook contains important information on the Company's policies, procedures, and rules. It also contains my obligations as an employee.

I understand that this Employee Handbook replaces and supersedes any and all previous employee handbooks that I may have received, or agreements or promises made by any representative of the Company other than a Corporate Officer prior to the date of my signature below, and that I cannot rely upon any promises or representations made to me by anyone concerning the terms and conditions of my employment that are contrary to or inconsistent with this Employee Handbook, or any subsequent written modifications or revisions to this Employee Handbook posted on the Company's Employee Information Boards.

I understand that my employment with the Company is conditioned upon the contents of this Employee Handbook. I further understand that, with the exception of the Submission of Disputes to Binding Arbitration section of this Employee Handbook and the Mutual Arbitration Agreement, the Company may alter, change, amend, rescind, or add to any policies, procedures, or rules set forth in this Employee Handbook from time to time with or without prior notice. I further understand that the Company will notify me of any material changes to this Employee Handbook, and that, by continuing employment after being so notified of such changes, I acknowledge, accept, and agree to such changes as a condition of my employment and continued employment.

I understand that the employment relationship between me and the Company is at-will. I am employed on an at-will basis, as are all Company employees, and nothing to the contrary stated anywhere in this Employee Handbook or by any Company representative changes my or any employee's at-will status. I am free to resign at any time, for any reason, with or without notice. Similarly, the Company is free to terminate my employment at any time, for any reason, or for no reason at all. I also understand that nothing in this Employee Handbook is to be construed as creating, whether by implication or otherwise, any legal or contractual obligations or restrictions

upon the Company's ability to terminate me as an employee at-will, for any reason at any time. Further, no person, other than a Corporate Officer of the Company, may enter into any written agreement amending this at-will employment policy or otherwise alter the at-will employment status of any employee.

By my signature below, I acknowledge that I have read and understand the provisions of this Employee Handbook and agree to abide by all Company policies, procedures, practices, and rules.

Since at least April 28, 2014, the Respondent has maintained the MAA in its employee handbook. The MAA requires employees to waive resolution of employment-related disputes by class, representative or collective action or other otherwise jointly with any other person. Since at least April 28, 2014, the Respondent has required all of its employees to enter into the MAA in order to obtain and maintain employment with the Respondent. (Jt. Mot. ¶ 4(e) & ¶ 4(i).)

The MAA provides, in relevant part:

This Mutual Arbitration Agreement ("Agreement"), by and between the undersigned employee ("Employee") and the Company, is made in consideration for the continued at-will employment of Employee, the benefits and compensation provided by Company to Employee, and Employee's and Company's mutual agreement to arbitrate as provided in this Agreement. Employee and Company hereby agree that any dispute, demand, claim, controversy, cause of action, or suit (collectively referred to as "Dispute") that Employee may have, at any time following the acceptance and execution of this Agreement, with or against Company, its affiliates, subsidiaries, officers, directors, agents, attorneys, representatives, and/or other employees, that in any way arises out of, involves, or relates to Employee's employment with Company or the separation of Employee's employment with Company (including without limitation, all Disputes involving wrongful termination, wages, compensation, work hours, . . . sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, and all Disputes involving interference and/or retaliation relating to workers' compensation, family or medical leave, health and safety, harassment, discrimination, and/or the opposition of harassment or discrimination, and/or any other employment-related Dispute in tort or contract), shall be submitted to and settled by final and binding arbitration in the county and state in which Employee is or was employed. Such arbitration shall be conducted pursuant to the American Arbitration Association's National Rules for the Resolution of Employment Disputes or the Institute for Christian Conciliation's Rules of Procedure for Christian Conciliation, then in effect, before an arbitrator licensed to practice law in the state in which Employee is or was employed and who is experienced with employment law. . . . The parties agree that all Disputes contemplated in this Agreement shall be arbitrated with Employee and Company as the only parties to the arbitration, and that no Dispute contemplated in this Agreement shall be arbitrated, or litigated in a court of law, as part of a class action, collective action, or otherwise jointly with any third party. Prior to sub-

² The acknowledgment of the handbook does not materially differ for employees outside of California for purposes of this decision.

mitting a Dispute to arbitration, the aggrieved party shall first attempt to resolve the Dispute by notifying the other party in writing of the Dispute. If the other party does not respond to and resolve the Dispute within 10 days of receipt of the written notification, the aggrieved party then may proceed to arbitration. The parties agree that the decision of the arbitrator shall be final and binding. Judgment on any award rendered by an arbitrator may be entered and enforced in any court having jurisdiction thereof.

This Agreement between Employee and Company to arbitrate all employment-related Disputes includes, but is not limited to, all Disputes under or involving Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the Family and Medical Leave Act, the Fair Labor Standards Act, the Equal Pay Act, the Fair Credit Act, the Employee Retirement Income Security Act, and all other federal, state, and municipal statutes, regulations, codes, ordinances, common laws, or public policies that regulate, govern, cover, or relate to equal employment, wrongful termination, wages, compensation, work hours, invasion of privacy, false imprisonment, assault, battery, malicious prosecution, defamation, negligence, personal injury, pain and suffering, emotional distress, loss of consortium, breach of fiduciary duty, sexual harassment, harassment and/or discrimination based on any class protected by federal, state or municipal law, or interference and/or retaliation involving workers' compensation, family or medical leave, health and safety, harassment, discrimination, or the opposition of harassment or discrimination, and any other employment-related Dispute in tort or contract. This Agreement shall not apply to claims for benefits under unemployment compensation laws or workers' compensation laws.

By agreeing to arbitrate all Disputes, Employee and Company understand that they are not giving up any substantive rights under federal, state, or municipal law (including the right to file claims with federal, state; or municipal government agencies). Rather, Employee and Company are mutually agreeing to submit all Disputes contemplated in this Agreement to arbitration, rather than to a court. Company shall bear the administrative costs and fees assessed by the arbitration provider selected by Employee: either the American Arbitration Association or the Institute for Christian Conciliation. Company shall be solely responsible for paying the arbitrator's fee. Except for those Disputes involving statutory rights under which the applicable statute may provide for an award of costs and attorney's fees, each party to the arbitration shall be solely responsible for its own costs and attorney's fees, if any, relating to any Dispute and/or arbitration. Should any party institute any action in a court of law or equity against the other party with respect to any Dispute required to be arbitrated under this Agreement, the responding party shall be entitled to recover from the initiating party all costs, expenses, and attorney fees incurred to enforce this Agreement and compel arbitration, and all other damages resulting from or incurred as a result of such court action.

Every individual who works for Company must have signed and returned to his/her supervisor this Agreement to be eligible for employment and continued employment with Company. Further, Employee's employment or continued employment will evidence Employee's acceptance of this Agreement. Employee acknowledges and agrees that Company is engaged in transactions involving interstate commerce, that this Agreement evidences a transaction involving commerce, and that this Agreement is subject to the Federal Arbitration Act. If any specific provision of this Agreement is invalid or unenforceable, the remainder of this Agreement shall remain binding and enforceable. This Agreement constitutes the entire mutual agreement to arbitrate between Employee and Company and supersedes any and all prior or contemporaneous oral or written agreements or understandings regarding the arbitration of employment-related Disputes. This Agreement is not, and shall not be construed to create, a contract of employment, express or implied, and shall not alter Employee's at-will employment status.

Employee and Company acknowledge that they have read this Mutual Arbitration Agreement, are giving up any right they might have at any point to sue each other, are waiving any right to a jury trial, and are knowingly and voluntarily consenting to all terms and conditions set forth in this Agreement.

(Jt. Exhs. I, J.) The MAA is also part of the application for employment with the Respondent. (Jt. Exhs. K, L.) It has its own signature requirement. The signed MAA is included in each new employee's "new employee packet" and is filed in the employee's personnel file. (Jt. Exhs. M–X.) During the period of December 18, 2010 to December 18, 2014, Respondent hired approximately 65,880 employees and re-hired approximately 6,324 employees for a total of approximately 72,204 recipients of the MAA. (Jt. Mot. ¶ 4(h).)

On December 3, 2013, the Respondent filed a motion in the United States District Court for the Eastern District of California to dismiss individual and representative wage-related claims a former employee had filed against it under California law, in *Ortiz v. Hobby Lobby Stores, Inc.*, 2:13-cv-01619-TLN-DAD (E.D. Cal.). (Jt. Exh. Y; Jt. Mot. ¶ 5.) The Respondent moved, in the alternative, pursuant to the Federal Arbitration Act (FAA), to compel individual arbitration of plaintiff's claims under the MAA the plaintiff had signed when she began her employment. (Jt. Exh. Y.)

On April 17, 2014, the Respondent filed a motion seeking to dismiss a putative class action lawsuit filed by multiple employees alleging wage and hour claims against it under California law in *Fardig v. Hobby Lobby Stores, Inc.*, 8:14-cv-00561-JVSAN (C.D. Cal.). (Jt. Exh. Z; Jt. Mot. ¶ 5.) In the alternative, pursuant to FAA, the Respondent moved to compel individual arbitration under the MAAs signed by each named plaintiff. (Joint Ex. 2Z.) On June 13, 2014, the U.S. District Court for the Central District of California granted the Respondent's motion to compel individual arbitration under the MAA. *Fardig v. Hobby Lobby Stores Inc.*, 2014 WL 2810025 (C.D. Cal. June 13, 2014). The *Fardig* court rejected the plaintiffs' arguments that the MAA was unenforceable under California

law and under the National Labor Relations Act pursuant to the Board's decision in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. granted in part and denied in part, 737 F.3d 344 (5th Cir. 2013).

On October 1, 2014, the U.S. District Court for the Eastern District of California in the *Ortiz* case granted the Respondent's motion to compel individual arbitration under the MAA. *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F.Supp. 3d 1070 (E.D. Cal. 2015). The court considered the Board's decision in *D. R. Horton*, and concluded its reasoning conflicted with the FAA and the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011).

III. DECISION AND ANALYSIS

A. The MAA's Prohibition on Class and Collective Legal Claims

Complaint paragraphs 4(a), (c), (d), and 5 allege that, at all material times since at least April 28, 2014, the Respondent has maintained the MAA, which requires employees to waive their right to resolution of employment-related disputes by collective or class action, as a condition of employment, in violation of Section 8(a)(1) of the Act.

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

1. Application of *D. R. Horton* and *Murphy Oil*

When evaluating whether a rule, including a mandatory arbitration agreement, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).³ See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enf'd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

Because the MAA explicitly prohibits employees from pursuing employment-related claims on a class or collective basis, I find it violates Section 8(a)(1). The right to pursue concerted legal action, including class complaints, addressing wages, hours, and working conditions falls within Section 7's protections. See, e.g., *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014); *D. R. Horton*, supra;⁴ see also *Eastex, Inc. v. NLRB*,

437 U.S. 556, 566 (1978)(Section 7 protects employee efforts seeking "to improve working conditions through resort to administrative and judicial forums; *Spandisco Oil & Royalty Co.*, 42 NLRB 942, 948-949 (1942); *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853-854 (1952), enf'd. 206 F.2d 325 (9th Cir. 1953); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under §7 of the National Labor Relations Act."); *Trinity Trucking & Materials Corp. v. NLRB*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), cert. denied, 438 U.S. 914 (1978). Accordingly, an employer rule or policy that interferes with such actions violates Section 8(a)(1). *D. R. Horton*, supra.; *Murphy Oil*, supra.; See also *Chesapeake Energy Corp.*, 362 NLRB No. 80 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27 (2015); *The Neiman Marcus Group, Inc.*, 362 NLRB No. 157 (2015); *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015); *PJ Cheese Inc.*, 362 NLRB No. 177 (2015); *Leslie's Pool Mart, Inc.*, 362 NLRB No. 184 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189 (2015).

The Respondent propounds numerous arguments as to why *D. R. Horton* and its progeny should be overturned.⁵ (R Br. 6-48.) I am, however, required to follow Board precedent, unless and until it is overruled by the United States Supreme Court.⁶ See *Gas Spring Co.*, 296 NLRB 84, 97 (1989) (citing, inter alia, *Insurance Agents International Union*, 119 NLRB 768 (1957), rev'd. 260 F.2d 736 (D.C. Cir. 1958), aff'd. 361 U.S. 477 (1960)), enf'd. 908 F.2d 966 (4th Cir. 1990), cert. denied 498 U.S. 1084 (1991). Applying the above-cited Board precedent, I find the MAA violates Section 8(a)(1).

Though the Board has made its ruling on the issue clear, I will address the Respondent's arguments that have not been as fully covered by previous decisions. The Respondent contends that a class action waiver does not abridge employees' right to seek class certification to any greater extent than an employer's filing an opposition to an employee's motion for class certification. Of course it does; the former precludes the right, the latter responds to it. And it is apparent the waiver gives the opposition teeth. The Respondent then adds the element of success to the employer's motion to secure its argument. Success of the employer's motion cannot be presumed, however. The Respondent's argument thus fails.

Deference and the Federal Arbitration Act, 128 Harv. L. Rev. 907 (January 12, 2015), provides a well-reasoned explanation as to why the Board's conclusion that collective and class litigation is protected Section 7 activity should be accorded deference by the courts.

⁵ Many of these arguments are in line with the dissents in *D. R. Horton* and *Murphy Oil*. Numerous Board and ALJ decisions have addressed the specific arguments raised by the Respondent and there is nothing I can add in this decision that has not already been addressed repeatedly.

⁶ The Respondent contends that, because the Board did not petition for a writ of certiorari to challenge the Fifth Circuit's rejection of the relevant part of *D. R. Horton*, and because that decision rests primarily on interpretation of a statute other than the NLRA, I should not be constrained by Board precedent. No authority was cited for this contention, however, and I therefore decline to stray from the Board's established caselaw on this point.

³ The Charging Party argues that *Lutheran Heritage* should be overruled. Any arguments regarding the legal integrity of Board precedent, however, are properly addressed to the Board.

⁴ The Board in *Murphy Oil* reexamined *D. R. Horton*, and determined that its reasoning and results were correct.